# M I N U T E S

# CHILD PROTECTION COMMITTEE MEETING

***April 10-11, 2014***
***SpringHill Suites Clearwater Room – Boise, Idaho***

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**Thursday, April 10, 2014**

*ATTENDANCE:*
Judge Ryan Boyer, Judge Barry Watson, Judge Frank Kotyk, Judge Calvin Campbell, Judge John Melanson, Liz Brandt, Mary Jo Beig, Jennifer Bergin, Scott Davis, Rob Luce, Miren Unsworth, Karlene Behringer, Dan English, Gabe McCarthy, Elizabeth Allen, Matt Kerbs, Jamie LaMure, Renae Bieri, Deena Layne, and Debbie Alsaker-Burke

Guests included Patti Tobias, who introduced Representative Christy Perry, and Richard Johnson from Family Advocates (4th Judicial District CASA Program).

1. Welcome and Introductions – Judge Boyer, acting chair in Judge Bryan Murray's absence, welcomed the committee members. He noted that with so many new members on the committee, introductions would be in order.

   Patti Tobias introduced Representative Christy Perry, who is running unopposed for her third term. She current serves on the Joint Finance and Appropriations Committee as well as the Health and Welfare Committee.

   Representative Perry shared that she was contacted by a constituent who had an unfortunate experience with the child protection process. In response to her constituent's experience, Representative Perry introduced House Bills 464 and 465 this last session. Representative Perry brought both draft bills to Patti for court comment. Ultimately, Representative Perry held both bills to obtain additional input, specifically from the Child Protection Committee.

   Patti requests that the Chair appoint a small work group to work with Representative Perry on her proposed legislation. Any new proposed bills will be brought back to the Child Protection Committee at the October meeting.

2. Judge Boyer shared upcoming conferences of interest to Committee members.

3. Attorney committee members were asked to consider applying for the Child Welfare Law Specialist Certification offered by the Idaho State Bar.

4. Liz Brandt made a motion to approve the minutes from the October 10, 2013 meeting of the Child Protection Committee. Judge Watson seconded the motion and the motion passed unanimously.

5. Update on Action Items from the April 2013 Committee meeting:
    a. Judge Watson summarized the work of the Idaho Code §16-1614 Implementation Work Group:
        i. Standardized form for appointment of counsel for children.
        ii. Guidance on appointment of same counsel for multiple children. Scott Davis noted that there may be different conflict rule for public defenders. (See opinion attached to minutes.)
        iii. The group is also examining what process is best when a child turns 12 during the life of the case. Committee members discussed practice around the state on appointment of counsel for children age 12 and over. Practice varies on this issue around the state. Working group will discuss this issue further.
        iv. Gabe McCarthy, a new member on the Child Protection Committee, agreed to join the work group as well.

**ACTION ITEM: DAB will revise minutes of the Idaho Code §16-1614 WG regarding the appointment of counsel for children in Kootenai County.**

b. The Committee will hold the "Circuit Team" project in abeyance until the courts and IDHW have addressed several projects to which staff and resources are currently committed.

c. Miren noted that judges should be receiving alternate care plans in every case. IDHW staff have been advised that alternate care plans should be "Part B" of every case plan.

d. Immigration: New policy on Immigration and Custom Enforcement (ICE) regarding parents involved in family law cases. Debbie will invite a speaker to answer questions on this new policy will at a later meeting.

e. Psychotropic prescriptions for children in care: IDHW Standard of Practice developed and finalized in January 2014. Many stakeholders were involved in developing the standard for psychotropic prescriptions. The Standard defines the role of IDHW and identifies roles that belong to stakeholders other than IDHW. Reports to court should identify which children are on psychotropic medications and include information about their treatment plan. Reports should also indicate if a child is NOT on psychotropic medications; it was noted the absence of information about psychotropic medications is not clear. Does a lack of information indicate the child is not on medications or that no information is available?

A brief discussion addressed the role of the court in this regard and judges recalled that the Committee had previously determined a monitoring role was the best practice at this time. Red flags judges should watch for include:

- Prescriptions for young children
- Several medications in the same prescriptive class
- Prescriptions without a diagnosis

f. Representative Perry presented to members of the Committee the experiences of her constituent that were the impetus for the legislation that she introduced this past legislative session. Representative Perry is a former foster parent and has acquaintances that have had their children removed. She noted that the Child Protective Act does not define imminent danger. She wondered:
    i. How do police officers know how to identify danger sufficient to remove a child?
    ii. What is the recourse when a child is "wrongfully" removed?
    iii. Is there a standard practice on removal around the state?
    iv. Should one police officer be allowed to make a removal decision? Should there be a consultation with anyone?

    Representative Perry consulted with Division Administrator Rob Luce at IDHW and they developed House Bills 464 and 465 to address these issues. She requested that the Committee explore possible definitions for imminent danger. She also offered to be a resource to the Child Protection Committee and would like the Committee to be a resource to the Legislature.

    A judge wondered if IDHW staff - state employees - should be offering "legal advice" to officers on the scene and a prosecutor suggested that a better option may be to have officers contact a deputy prosecutor. In Canyon County, there will be a judge and prosecutor on call for these cases.

    Rob Luce noted that HB 465 (on consultation) was designed to increase the dialogue on removal, not for IDHW staff to give legal advice or overrule officers.

    He reported this is a problem in three areas: Kootenai (Post Falls), Ada, and Canyon counties. There are a number of children (approx. 200) who are returned within 30 days. No detail was provided on <u>why</u> children are returned home. Rob supports further exploration of these issues.

    A proposal was made to work with law enforcement on a best practice in removal for imminent danger.

    Judge Boyer asked that the Statute and Rules Subcommittee work with Representative Perry on these issues.

**ACTION ITEM: DAB to schedule meeting(s) of the Statute and Rules Subcommittee this summer to address these issues.**

Representative Perry commented that the solution is multi-faceted and will involve a number of remedies. The group had a short discussion comparing the deadlines for each group to advance legislation or rules. Legislation from IDHW must be ready to go by July 1, 2014; the Court's deadline would be October 2014. Rep. Perry can introduce legislation at any time. However, IDHW does not have a deadline if Representative Perry advances the legislation.

Rob will send drafts of all legislation proposed by IDHW for FY2015 legislative session to all Child Protection Committee members (specifically the Statute and Rules Subcommittee).

The current roster of the Statue and Rules Subcommittee shall include:

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| Judge Bryan Murray (Chair) | Senior Judge Lynne Krogh |
| Rep. Christy Perry (Consultant) | Liz Brandt |
| Miren Unsworth | Jennifer Bergin |
| Rob Luce | Dan English |
| Elizabeth Allen | Mary Jo Beig |
| Deena Layne | Debra Alsaker-Burke |

**ACTION ITEM: DAB will contact Senior Judge Lynne Krogh to see if she is willing/able to continue her role on the subcommittee.**

g. Governor's Children at Risk Task Force: Child Fatality Review
Until recently, Idaho was the only state without a fatality review team. Governor Otter signed an executive order recreating a fatality review board in Idaho. Looking for trends and themes in Idaho's child deaths, the board looked at 82 closed cases from 2011. Miren provided a copy of the Idaho Child Death Review Team's first findings, which focused on three main areas of concern:
   - Clarifying what qualifies as a SIDS death
   - Easy access to firearms
   - Suicide

6. Child Protection by the Numbers
   a. Renae reviewed number of petitions filed, youth in care, timeliness and IV-E hearing data with the Committee. We will provide "big picture"/trend data at each Committee meeting.
   b. Taunya reviewed with the Committee the Advancing Justice project and specifically, the process for developing a case flow management plan for most case types. A working group will develop a template case flow management document for child protection cases over the summer of 2014. In September, Judge Hoffman, a consultant from the National Center for State Courts (NCSC) will provide technical assistance at a two-day conference to assist district teams to develop a child protection case plan.

      The goal of the case plans are to ensure due process and consistency/predictability in case management.

7. Legislation and Rules
   a. Proposed Amendment to IJR 40. The members of the Child Protection Committee discussed concerns with youth participation in shelter care and adjudicatory hearings, which are more contentious. Attorneys for youth appointed at shelter care have no real ability to contact their client, which also

precludes them from participating in the shelter care hearing. In both the 7th District and also in Canyon County, it is noted that there is no role for children's counsel until after adjudication, based on how IJR 40 is interpreted there.

A proposal was made that where no attorney for the child is appointed, then notice to the child should be received post-adjudicatory. For children where counsel is appointed, the notice and right to appear should be provided to the child for all hearings.

It was noted that children aged 8-11 are too young to put in a shelter care or adjudicatory hearing. It was also pointed out that perhaps IDHW should be responsible for providing notice to the child, given that they are best positioned to know where the child is (their placement) at all times.

Gabe McCarthy made a motion to reject the proposed amendment to IJR 40, leaving the rule as currently drafted. Second by Judge Watson.

Additional discussion noted that if the Committee can address representation issues, then perhaps changes would be possible.

The motion passed unanimously with one abstention from Judge Kotyk.

**ACTION ITEM: DAB to research what other states are doing with children in court – at what point are they allowed to be present? Does this change with our without attorney representation?**

An additional proposal was made to clarify that youth are a party and to assist in clarifying the role of counsel for children. There is incongruence between early appointment of counsel and concern about youth attending shelter care or adjudicatory hearings.

Liz Brandt made an alternate motion to send IJR 40 to the Statutes and Rules Subcommittee instead of rejecting proposed amendments, with direction to research a balance between the need for representation as early as possible and the concern about youth attending shelter care and adjudicatory hearings. Motion seconded by Judge Kotyk. Motion unanimously approved.

b. IJR 37 – Recommendation that IJR 37 be referred to the Statute and Rules to align Rule 37 with the current version of I.C. §16-1614 and IJR 40. Motion to do so made by Judge Campbell and seconded by Liz Brandt. Motion unanimously approved.

c. IJR 16 – Should we amend or eliminate IJR 16? Judge Campbell made a motion to refer to the Statute and Rules Subcommittee, asking the Subcommittee to comprehensively review IJR 16, consider eliminating it entirely, or replacing the current version of IJR 16 with statutory or rule authority for juvenile judges to

only order a child protection investigation. (Similar to I.C. §32-717 or I.C. §16-1613). Second for the motion from Rob Luce. Motion approved unanimously.

d. Exemption of GAL Volunteers and Staff from Fee to check Child Protection Central Registry – Dan English, Executive Director for the 1st District CASA Program, explained the impact of the additional $20 cost for GAL volunteers and programs. From a public policy point of view, it makes sense to exempt GALs from this fee.

IDHW noted that the new rule allows individuals to check and see if he/she is on the child protection central registry. The new rule has sparked interest from other entities, like the Boy Scouts, Boys/Girls Clubs, juvenile courts, etc. Rob Luce notes that the fee will be used to hire staff to do these checks. Concern is expressed about making an exception for GALs; how can we reject others further down the road?

It was suggested that perhaps the GALs could be grandfathered in, or exempted because they are court-ordered to submit to the background check process. It was also noted that the GAL programs are using taxpayer dollars for their volunteers' checks.

The question was raised whether the legislature should be paying for this? Committee members also asked if the Committee should be making this decision, or if the legislature should.

Judge Melanson noted that there are good arguments supporting both positions and made a motion to table this issue until IDHW begins to charge for the registry checks. Judge Campbell seconded the motion. The motion passed unanimously.

8. GAL Allocation

Debbie and Dan introduced the proposed GAL allocation for FY2015. Dan noted that programs appreciated the efforts of the AOC in requesting additional funding for the GAL programs.

Jenn Bergin made a motion to approve the proposed FY2015 allocation for Idaho's GAL programs. Second by Judge Watson. Motion passes unanimously.

*Adjourned for the day.*

**Friday, April 11, 2014**

9. The Committee welcomed back Representative Perry and welcomed Mike Scholl.

10. Rob Luce shared with members of the Child Protection Committee six ideas for possible legislation from IDHW in the 2015 Legislative Session. Rob invited the court to

collaborate on the proposed legislation, but noted that it was up to the Committee to refer or not refer proposed legislation from IDHW to the Statute and Rules Subcommittee. Rob commented that whether or not the matters are referred to the Statute and Rules Subcommittee, IDHW will explore them further.

a. Liability of foster parents for acts of foster children – Some examples of a fix include obtaining insurance policy coverage for foster parents, and/or defining foster parents as employees of the stated covered by the Tort Claims Act. Property damage is a lesser issue; current statutes limit the foster parent's liability to $2,500 and Risk Management has an insurance policy that covers the current limit.

   The ability for foster children to drive is another issue. State is not liable for acts of foster child, or of any person in the custody of the state, who is driving. Foster children can and should be included on foster parent's auto policy. However, this will result in increased premiums for foster parents, which Rob proposed be covered by IDHW.

   Rob is exploring the need for a statute or rule fix – or if the desired changes can be made without the formal process.

b. Re-Homing – Rehoming is a process whereby parents who have adopted children – mostly international – use social media to find another home for the child. Concerns focus on a lack of oversight and non-compliance with the ICPC. Suggested ideas include redrafting the adoption advertising statute, as well as revising ICPC, although revising the ICPC would be a difficult task and likely not feasible. Rob requested referring this issue to the Statute and Rules Subcommittee and the CP Committee concurred. Rob will provide draft legislation for Statute and Rules Subcommittee.

c. Safe Haven – Currently, Idaho's Safe Haven statute does not allow inquiries into potential Indian or Alaska Native Child ancestry. The question is whether ICWA preempts the Safe Haven statue, thus rendering adoption voidable if ICWA requirements are not met. Rob will draft a proposed amendment to Safe Haven and provide it to the Statute and Rules Subcommittee and the CP Committee for comment and suggestions.

d. Reinstating parental rights – If parental rights are terminated and no adoptive home found, is there a need to develop a process for parents to reinstate parental rights? Rob will draft proposed legislation and forward to the Statute and Rules Subcommittee and CP Committee for comment and recommendation.

e. Defining "unstable home environment" as a ground for jurisdiction under Idaho's Child Protective Act. Rob noted that the Child Protection Act does not define "unstable home environment" and what exists is broad and lacks clarity. Rob further noted when "unstable home environment" is used as a basis for

jurisdiction under the CPA, it results in "mission creep" for IDHW and in some cases causes IDHW to be perceived as "juvenile corrections lite." Rob proposed that the CPA be amended to remove "unstable home environment" as a ground for jurisdiction.

The Committee engaged in a lengthy and lively discussion about the removal of unstable home environment as a ground for jurisdiction. A summary of comments and concerns:

- There may be constitutional issues because the term is both broad and vague.
- Attorneys find "unstable home environment" to be a useful tool to move cases forward and with less contention between participants. Parents are generally unwilling to stipulate to abuse, abandonment, or neglect but are generally willing to stipulate to unstable home environment as the basis for jurisdiction.
- If "unstable home environment" is no longer available as a basis for jurisdiction, concern was expressed that shelter care hearings will likely be litigated, and as a result, become more contentious. Prosecutors may need to have children/youth testify at Shelter Care and Adjudicatory hearings, which may re-traumatize some children.
- "Unstable home environment" as a basis for jurisdiction is also a tool to keep some parents off the Child Protection Central Registry.
- CASA expressed concerns about making a major shift in policy regarding the use of "unstable home environment" as a basis for jurisdiction as it may put some children at risk.

The CP Committee requests that Rob refer this to the Statute and Rules Subcommittee for comments and suggestions, or in the alternative, to send draft legislation to the CP Committee for comments and suggestions.

If sent to the Statute and Rules Subcommittee, the CP Committee offered the following guidance:

- Research the extent to which courts use "unstable home environment" as a basis for jurisdiction around the state.
- Explore use of "unstable home environment" as a type of neglect and provide a definition.
- Explore feasibility of using "unstable home environment" as a basis for jurisdiction, but NOT a ground for removal.

f. Removal of Offender. Rob noted that there are two options in a removal situation: remove the child or remove the offender. Rob commented that the CPA has a presumption in favor of removing the child. He suggested that the Child Protective Act be amended to presume that the offender be the individual removed when there is imminent danger to the child.

Committee members commented as follows:

- May be due process/constitutional issues. Rob cited Mueller v. City of Boise (9th Circuit opinion) as authority for the proposition that removal of offender does not raise constitutional issues.
- If there is a second parent present who will protect the child, then there is no need to remove the child. But, it is hard to assess whether the second parent can/will protect the child, so the child may still be unsafe.
- Often, both parents "have issues", so removing the offender is not an option.
- Removing the offender would better support victims of domestic violence.
- If there is a no-contact order in place and the offender refuses to obey the order, the child remains unsafe.
- If removal of an offender is effective, the child does not need to be brought into care and it is more likely that voluntary services or protective supervision will be effective.

Rob will research and confer with colleagues on this issue. He suggests that this issue be referred to the Statute and Rules Subcommittee and the CP Committee concurred. Rob will draft proposed legislation and provide draft(s) to the Subcommittee for comment and suggestion.

11. Shared Data Working Group update
    a. Miren Unsworth and Janice Beller updated the CP Committee on the work of the Shared Data Working Group. Committee members were asked to review and approve the data measures provided in the meeting materials. Specifically, CP Committee members were asked if these measures provided the information Committee members needed and if there were any data measures that should be added.

       Elizabeth Brandt moved to approve the data measures as presented. Judge Watson seconded. Unanimously approved.

    b. Advisement of Rights in TPR cases – The consensus of the Committee was that there is no need for an Advisement of Rights in TPR cases. Parent's due process rights are protected by appointment of counsel. However, the Committee discussed the need to have a judge, other than the judge who heard the child protection case, hear the TPR trial. Committee members had differing opinions; some counties use senior judges to hear TPR cases, while in other counties, the child protection judge also hears the TPR action. It was noted that judges always have the option to recuse themselves as appropriate.

**ACTION ITEM: DAB to review judicial ethics opinions for guidance on this issue and report back at the October meeting.**

    c. Independent Living – Committee members noted that there is a Bench Card for Judges on Independent Living. The Committee wondered if the Bench Card

provided sufficient guidance to judges. The Committee's recommendation: Encourage judges to use the Independent Living Bench Card and to address specifically Independent Living Plans and Educational Goals at appropriate hearings.

d. Child and Family Service Review (CFSR) – Idaho's next CFSR is scheduled for 2016. Miren noted that IDHW's current focus is child safety. IDHW has revised its safety assessment tool and has provided statewide training to all IDHW staff.

   One Committee member noted that aligning IDHW's safety language with the language of the CPA would be useful to court process and would provide notice to, and consistency for, parents. Miren noted that case file review and stakeholder interviews have been and will continue to be a big part of the CFSR. Miren informed Committee members that some of them would likely be contacted for a stakeholder interview. She encouraged Committee members to agree to be interviewed.

12. Adjorned. **Next meeting is October 23-24, 2014.**

**APPENDIX A**

**A New Analysis of When Public Defender Conflicts of Interest are Imputed.**

Two cases have recently revised the analysis of when public defenders' conflicts are imputed to other members of their office. *State v. Cook*, 144 Idaho 784, 171 P.3d 1282 (Id. App. 2007) and *State v. Severson*, 147 Idaho 694, 215 P.3d 414 (2009).

The new analysis differs from the imputed conflict analysis in Idaho Rule of Professional Conduct 1.10. In *Severson*, the Idaho Supreme Court referenced *Cook* and clarified the conflict analysis public defenders should utilize in determining when conflicts of interests are imputed. Thus, the analysis starts with *Cook*.

In *Cook*, the Court of Appeals analyzed whether the concurrent representation of a prosecution witness by one public defender constituted a disqualifying conflict of interest when another public defender from the same office was representing the defendant. The *Cook* Court determined that when one member of the public defenders' office represents a prosecution witness (in another case) and another member represents the defendant in the case in which the witness will testify, the public defenders are on opposite sides of the issue of the defendant's culpability and an actual conflict of interest is inherent in that concurrent representation. The *Cook* Court delineated the potential conflicts arising from concurrent representation of a prosecution witness and a defendant. 144 Idaho at 789, 171 P.3d at1290.

The next issue the *Cook* Court determined was whether under Idaho Rules of Professional Conduct 1.0 and 1.10, one public defender's conflict of interest was imputed to the other public defender. The *Cook* Court concluded that rather than adopt a per se rule that the conflict is imputed to the other member of the public defenders' office, as I.R.P.C. 1.10 provides, it was more appropriate to determine on a case-by-case basis whether, "the circumstances demonstrated

a potential conflict of interest and a significant likelihood of prejudice" and if so, "the presumption of both an actual conflict of interest and actual prejudice will arise without the necessity of proving such prejudice." 144 Idaho at 793, 173 P.3d at 1291. The *Cook* Court's rationale for the apparent exception to the Idaho Rules of Professional Conduct was essentially that (1) concurrent representation by public defenders generally will create no incentive (economic or otherwise) for diminished advocacy in such cases and (2) a per se rule imputing conflicts of interests to affiliated public defenders would potentially deprive defendants of competent local public defenders. 144 Idaho at 794, 173 P.3d. at 1292.

Building on *Cook*, in *Severson*, the Idaho Supreme Court clarified when public defenders' conflicts of interest will be imputed. The Court held that whether public defender conflicts are imputed to the entire office is to be determined on a case-by-case basis. In essence, the Court determined that a public defenders' office does not fall within the definition of a "firm" under Idaho Rule of Professional Conduct 1.0. The *Severson* Court explained that to make the determination whether conflicts are imputed, the district court, and presumably, before the matter is presented to the district court, the public defender, is to determine whether the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice. 147 Idaho at 706, 215 P.3d. at 426. Finally, the *Severson* Court indicated that in assessing the significant likelihood of prejudice, screening or other protective measures undertaken by public defenders are to be considered by the courts. 147 Idaho at 707, 215 P.3d at 427.

I believe that in *Severson*, the Idaho Supreme Court has specifically recognized that the analysis of when public defenders' conflicts of interests are imputed to other members of the office is different than the analysis under Idaho Rule of Professional Conduct 1.10. Public defenders' conflicts of interest are not automatically imputed to other members of the public

defenders' office. Instead, whether public defender conflicts are imputed to the entire office is determined on a case-by-case basis and following an analysis whether the circumstances demonstrate a potential conflict of interest and a significant likelihood of prejudice. Similarly, unlike the corresponding analysis under Idaho Rule Professional Conduct 1.10, screening or other protective measures may be considered by public defenders and trial courts to determine whether there is a significant likelihood of prejudice.

However, given that a defendant has a Sixth Amendment right to be represented by conflict-free counsel, and the trial court's affirmative duty to inquire into a potential conflict of interest whenever it knows or reasonably should know that a particular conflict may exist, public defenders should disclose potential conflicts of interest to the trial court to assure that the trial court may conduct the hearings mandated by case law and *Severson* to determine whether the circumstances demonstrate a potential conflict of interest and whether a significant likelihood of prejudice exists. Failure to bring potential conflicts of interest to the trial court's attention may result in a basis for appeal, claims of ineffective assistance or disciplinary grievances.